82 - 2088

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner,
v.
KAY BURNS, *et al.*,
Respondents.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner,
v.
EUGENE J. GOSS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GERALD P. NORTON
Counsel of Record
WALTER B. CONNOLLY, JR.
TIMOTHY L. MOOREHEAD
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8103

WERNER WEINSTOCK
JOHN P. MANGAN
1285 Avenue of the Americas
New York, New York 10019

FRED A. FREUND
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Section 7(c)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(c)(1), authorizes an individual aggrieved by prohibited age discrimination to "bring" a private action, but terminates that right to "bring" an action upon "commencement" of an action by the Equal Employment Opportunity Commission to enforce that person's right under the Act. The question presented is: given EEOC's role as the primary enforcer of the Act, when EEOC commences an action to enforce the ADEA rights of individuals does section 7(c)(1) terminate their right not only to commence a later private action but also to bring to a conclusion a duplicative private action they commenced prior to EEOC's suit.

PARTIES TO THE PROCEEDING

The following persons are respondents in *Burns* in addition to Kay Burns: Arnold Abrahamsen, George Alleman, Roy Allen, Florence Jeanne Anzalone, Frank Apadula, Nat Arkin, Lester Beesley, Bernard Bourdeau, Arnold Brown, Theresa Brown, Edward Button, Helen Cain, John Carstens, Richard Cavanagh, John Cerrato, Mary Clara, Arleen Comoglio, James Connors, Richard Conover, Edwin Crawford, James Creedon, Agnes Curry, Kenneth Curry, Julia Devine, Irene "Robin" Dewender, Grace DiBarros, Edward Dorner, Lillian Dragowetz, Warren Ellis, Frank Eng, Joseph Farrar, Byron Fiske Field, Robert Finnen, Burton Fischer, Warren Fischer, Joseph Furlani, Mary Gallagher, Joseph Gilmartin, Bertram Gottfried, Willard Greenwood, Russell Grubb, Charles Halbert, Judah Harris, Vincent Hayes, Arthur Hellander, Raymond Hilton, John Hoffman, Elmarie Holmes, Edythe Hutchingson, Helen Ilic, Salvatore Impalli, Harriet Jacobs, Fred Jaffe, Ellen Jeppesen, John Joyce, Elliot Kassenoff, Mary Kells, Michael Kennedy, Martha Kerrigan, Harold Kessler, Paul King, William

Kirchner, Frances Klepsch, Robert Knoth, Daniel Kraics, David Krugman, George Kuhlman, George Kurz, Maie Kuuskvere, Joan Lang, Edward Lawlor, Thomas Leonard, Martin Lerner, Edward Lockhart, Marie Magee, Eugene Malley, Anthony Manahan, George Martin, William Maurer, Mary Mayer, Horton McBride, Edward McCormack, John McCormack, Margery McCormick, William McGarry, Walter McGill, James McHugh, Richard McLaren, Jerome Miller, C. Jay Moorhead, Louis Mouras, David Murphy, Hermine Nelson, Albert Nieman, Edmund O'Brien, G. Robert Parker, Frederick Paul, Dorothy Phelan, Henry Pratt, Frank Raimo, James Reid, Robert Reynolds, Francis Roland, Faye Brooks Rossman, Dorothy Salvin, Robert Schmuck, Harold Schrade, Dwight Shook, George Sisler, Thomas Sloan, Joseph Smith, William Stanton, Walter Stasiak, Lynch Steiner, Johanna Sterbin, Donald Stock, John Sullivan, Robert Sullivan, David Supple, Jock Thornton, Mary Tierney, Edward Topak, Anthony Urbanik, Howard Van Voorhis, James Verdone, Irving Vogel, Herbert Watson, Richard Wetmore, Delma Wiggins, Douglas Zellner, Walter Zwirko.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 696 F.2d 21 (Pet. App. 1a-7a). The court of appeals' Order denying the petition for rehearing and suggestion for rehearing en banc is unreported (Pet. App. 25a-26a). The opinion and order of the District Court for the Southern District of New York in *Burns* denying petitioner's motion to dismiss is reported at 530 F. Supp. 768 (Pet. App. 8a-16a). The order of that court in *Goss* denying petitioner's motion to dismiss is unreported (Pet. App. 18a).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 9, 1982 (Pet. App. 23a-24a). A timely petition for rehearing and suggestion for rehearing en banc was denied on March 23, 1983 (Pet. App. 25a-26a), and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statutory provision involved in this case is section 7 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626, which provides in pertinent part as follows:

> (b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). * * * Before instituting any action under this section, the [Commission] shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.
>
> (c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the [Commission] to enforce the right of such employee under this Act.
>
> * * * *
>
> (d) No civil action may be commenced by an individual under this section until 60 days after a

charge alleging unlawful discrimination has been filed with the [Commission]. Such a charge shall be filed—

> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 14(b) of this Act applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the [Commission] shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.[1]

STATEMENT OF THE CASE

In fall 1978, petitioner, The Equitable Life Assurance Society of the United States, carried out a reduction in force pursuant to which approximately 500 officers and employees were terminated. Of those employees, more than 100 eventually filed charges of age discrimination with the Equal Employment Opportunity Commission ("EEOC"), most charges having been filed in August 1979.

In September 1979, before EEOC had had an opportunity to investigate the bulk of the charges, six former employees commenced the *Burns* action in the United States District Court for the Southern District of New York pursuant to section 7(c)(1) of the ADEA, 29 U.S.C. § 626(c)(1). Filed either with the complaint or at various times thereafter through mid-1981 were written consents of some 126 other former employees to be-

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[1] Effective July 1, 1979, enforcement of the ADEA was transferred from the Secretary of Labor to the Equal Employment Opportunity Commission. Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978); Executive Order No. 12067, 43 Fed. Reg. 28967 (1978).

come plaintiffs in *Burns*, pursuant to the unusual joinder provision of section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), which precludes "opt-out" class actions pursuant to Rule 23, Fed. R. Civ. P., section 16 having been incorporated by reference in certain respects pursuant to section 7(b) of the ADEA, 29 U.S.C. § 626(b). In January 1980, another former employee commenced the *Goss* action pursuant to section 7(c)(1) in the District of New Jersey, also alleging that his termination in the 1978 staff reduction violated the ADEA. That action was later transferred to the Southern District of New York.

While the private actions were pending in a largely dormant state, EEOC investigated the charges filed and EEOC and petitioner subsequently sought to resolve the matter through conciliation, which the ADEA requires whenever charges are filed and before EEOC can sue. 29 U.S.C. §§ 626(b), (d). The time-consuming efforts to investigate and conciliate the many charges were ultimately unsuccessful, and on September 1, 1981, EEOC commenced an action in the Southern District alleging, inter alia, that petitioner had violated the ADEA when it had discharged its employees. The complaint also alleged violations concerning promotions. EEOC's action sought to enforce the rights of all present and former employees adversely affected, including all plaintiffs in the private actions.

Petitioner filed motions for dismissal in *Burns* and *Goss* contending that pursuant to section 7(c)(1) of the ADEA EEOC's commencement of an action to enforce the rights of the plaintiffs terminated their right to bring those duplicative private actions to a conclusion. Petitioner relied, inter alia, upon a line of authority construing section 7(c)(1) and other provisions of the ADEA as giving federal agency enforcement priority over private litigation.

The district court denied petitioner's motion to dismiss. Stating that "the answer is by no means obvious"

(Pet. App. 12a), the court concluded that the statutory language could be read to support both sides (Pet. App. 12a). However, without discussing the authorities relied on by petitioner, the court read the legislative history of the ADEA as suggesting the "co-equal status of employee and EEOC suits" (Pet. App. 15a). Noting that section 16(b) of the FLSA, 29 U.S.C. § 216(b), as amended in 1961, contained a somewhat similar provision terminating private rights of action, the court also relied on language in that legislative history, which stated that the agency's action would not terminate pending cases, as indicating what Congress intended to be the effect of the separate termination provision enacted as section 7(c)(1) of the ADEA in 1967, although the legislative history of the ADEA reflects no awareness of the legislative history of the 1961 FLSA amendment (Pet. App. 13a).

The district court accepted the plaintiffs' argument that the right to "bring" a private action, which section 7(c)(1) both confers and then terminates when the government commences an action, means only the right to "commence" a later action, so that pending private actions survive EEOC's commencement of an action to enforce the rights of the plaintiffs in those actions (Pet. App. 12a).[2] Thus, the court construed section 7(c)(1) to allow an individual who beats EEOC to the courthouse by even the smallest margin to be free to continue his action, while a private action commenced any time after EEOC's action would be terminated.[3]

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[2] As to some of the plaintiffs in *Burns* the court noted that EEOC's complaint, as amended, did not seek all of the same relief that the plaintiffs sought, i.e., liquidated damages (Pet. App. 11a, 15a), but the court's interpretation of section 7(c)(1) evidently did not turn on that distinction, as the court denied petitioner's motion even as to the plaintiff in *Goss* for whom EEOC sought such relief.

[3] Under section 7(c)(1) a private action to effectuate the purposes of the Act may be brought in any federal or state court of competent jurisdiction. The day after filing the complaint in *Burns*, the plaintiffs' attorneys in *Burns* filed on behalf of three other former

The court of appeals affirmed.[4] Concurring in the district court's premise of a parity between private actions and EEOC actions, the court of appeals concluded that under the ADEA the "allocati[on of] enforcement authority between public and private plaintiffs" was the same as under the FLSA (Pet. App. 5a), and was comparable to that existing under Title VII of the Civil Rights Act (Pet. App. 6a n.2).

The court of appeals also endorsed the district court's reliance upon the legislative history of the FLSA's similar provision for termination of suits. The court of appeals justified this reliance by formulating a new principle of statutory construction, i.e., that in enacting a new law incorporating sections of a prior law Congress should be presumed to have known and endorsed the legislative history of the incorporated law and all of its amendments, even in the absence of any evident awareness of that history.[5]

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employees of petitioner a private action in state court alleging age discrimination as to individuals over 40 in violation of state law, on behalf of an alleged class consisting in essence of all employees terminated in the same staff reduction action at issue in these actions (and in the EEOC action) who did not become parties to private federal court actions. Upon appeal from a decision concerning whether to certify the class action, the Appellate Division ruled that there could be no class certification because "the EEOC action constitutes the superior method of fairly and efficiently adjudicating this controversy * * *." *Cannon v. Equitable Life Assur. Soc'y*, 87 App. Div. 2d 403, 451 N.Y.S.2d 817 (2d Dep't 1982). Citing the district court's decision in this case, however, the court also held that the state court private action, which it described as seeking legal or equitable relief to effectuate the purposes of the ADEA, was not terminated or superseded under section 7(c) or any other provision of the ADEA by EEOC's commencement of an action to enforce the rights of the three state court plaintiffs. 87 App. Div. 2d at 409-10, 451 N.Y.S.2d at 820-21.

[4] Because of the substantial ground for difference of opinion about the district court's ruling, interlocutory appeals were certified pursuant to 28 U.S.C. § 1292(b) (Pet. App. 17a-22a).

[5] The court of appeals also relied upon the ambiguous legislative history of section 14(a) of the ADEA, 29 U.S.C. § 633(a), a pro-

Petitioner had noted a variety of adverse policy consequences from the coexistence of overlapping private and public actions to enforce the same rights, which the district court's decision sanctioned, and had contended that Congress could not reasonably be thought to have intended to permit such overlapping actions. Stating that there was no overlap, the court of appeals did not address all of the policy issues (Pet. App. 6a-7a & n.2). In response to petitioner's petition for rehearing EEOC conceded that the overlap existed, but the court let its decision stand (Pet. App. 25a-26a).[6]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

A. The Statutory Scheme Of The ADEA: A Unique Primacy Of Agency Enforcement Through Conciliation And Litigation Over Private Litigation.

The ADEA is a hybrid statute which, when enacted in 1967, drew from both Title VII of the Civil Rights Act of 1964, which prohibited employment discrimination on the basis of race, sex, religion, and national origin, and

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vision which deals with the different subject of the relationship between federal and state laws prohibiting age discrimination (Pet. App. 5a-6a).

[6] Petitioner filed a petition for rehearing asserting that the court had erred in stating that "EEOC stipulated out of its lawsuit all of the *Burns* plaintiffs that it had originally named" (Pet. App. 3a). After the court initially denied the petition it entered an order vacating the denial as premature (Pet. App. 27a-29a) and it then requested responses from plaintiffs and EEOC (which had filed an amicus brief in support of the plaintiffs). In its response EEOC explained that the stipulation only removed some of the *Burns* plaintiffs from the list of persons for whom EEOC was seeking liquidated damages; EEOC stated that it was still seeking injunctive relief and back wages for all *Burns* plaintiffs whose rights may have been violated (Letter from EEOC counsel to the Clerk of the court of appeals dated Feb. 16, 1983). The court then denied rehearing.

the Fair Labor Standards Act of 1938, as then amended, which established minimum wage and overtime requirements. Congress based the substantive prohibitions against age discrimination on the language of Title VII. However, Congress based the remedies and enforcement provisions of the ADEA largely on the FLSA, incorporating by reference specified provisions of the FLSA as they then stood, and adding certain variations. Thus, section 7(b) of the ADEA provides that the ADEA "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of [the FLSA], and *subsection (c) of this section* * * *." 29 U.S.C. § 626(b) (emphasis added). *See generally, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 766 (1979); *Lorillard v. Pons*, 434 U.S. 575, 579 (1978).

The relationship of private and agency enforcement under the ADEA, however, differs from that existing under either of these statutes, and the right to bring a private action is more circumscribed under the ADEA than under the FLSA or Title VII. When the ADEA was enacted the FLSA authorized not only private suits but also suits by the Secretary of Labor. Thus, both the Secretary and an employee had the right to sue for unpaid minimum wages or overtime. 29 U.S.C. §§ 216(b), 217. Section 16(b) gave an individual the right to bring a private action, or to become a plaintiff in a private action, but, as amended in 1961, provided that such right would terminate if the Secretary filed a complaint seeking relief for that individual.[7] At that time, by con-

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[7] As of enactment of the ADEA, section 16(b), as then amended, provided in relevant part as follows:

> The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under [section 17 of the FLSA] in which restraint is sought of any further delay in the payment of unpaid minimum

trast, EEOC had no authority under Title VII to litigate discrimination claims and hence there was no comparable provision for preclusion or termination of Title VII litigation commenced by private parties. 78 Stat. 241 (1964).[8]

In the ADEA, while Congress generally authorized private actions and agency enforcement pursuant to sections 16 and 17 of the FLSA, it did not simply incorporate by reference the termination provision of section 16(b) of the FLSA. Rather, it specifically provided in section 7(c)(1) that an individual's private right of action would terminate upon commencement of an action by the Secretary to enforce the rights of the individual. 29 U.S.C. § 626(c)(1).[9]

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wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under [section 6 or section 7 of the FLSA] by an employer liable therefor under the provisions of this subsection. [29 U.S.C. § 216(b).]

[8] Even when EEOC was authorized in 1972 to sue under Title VII there was no evidence of a congressional intention to provide for EEOC control of enforcement litigation comparable to that existing under the ADEA. *General Tel. Co. v. EEOC*, 446 U.S. 318, 332-33 (1980). To the contrary, Congress provided that private parties could intervene as parties plaintiffs in actions brought by EEOC (42 U.S.C. § 2000e-5(f)(1)), an option not permitted under the ADEA. *See, e.g., Dunlop v. Pan Am. World Airways, Inc.*, 672 F.2d 1044, 1052-53 (2d Cir. 1982). Nor does Title VII, even now, contain any provision permitting an action by EEOC to preclude or terminate a private action. *See Adams v. Procter & Gamble Mfg. Co.*, 678 F.2d 1190, 1194 & n.5 (4th Cir. 1982), *vacated on other grounds*, 697 F.2d 582 (4th Cir. 1983).

[9] As noted (*see* p. 6, *supra*), the lower court relied in part on certain legislative history of the 1961 amendment to section 16(b) which indicated that the termination provision of section 16(b) would not apply to actions commenced before the agency had sued (Pet. App. 4a-5a). Citing *Lorillard v. Pons*, *supra*, the court justified this reliance by asserting that where it incorporated another law by reference, Congress should be presumed to be familiar with and have endorsed the preenactment legislative history of the incorporated law and all its amendments (section 16 had been amended

Moreover, in section 7(b) of the ADEA Congress provided that before instituting any action under the ADEA "the [Commission] shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of [the Act] through informal methods of conciliation, conference and persuasion." 29 U.S.C. § 626(b). In aid of that commitment to agency conciliation, Congress further provided in section 7(d) of the ADEA that before commencing an action an individual must first notify EEOC of the grievance within a limited period of time and then wait a prescribed period,[10] while EEOC must "promptly

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six times by 1967, creating what has been called a "tangled skein" of legislative history (*EEOC v. Gilbarco, Inc.*, 615 F.2d 985, 1011 (4th Cir. 1980)), even if, as here, there is not the slightest evidence of such awareness. This Court has never sanctioned such a dubious principle of statutory construction, which is not only highly unrealistic but ignores this Court's warnings about the "treacherous" business of drawing inferences from congressional silence. *E.g.*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 310-11 (1974); 2A Sutherland, *Statutory Construction* § 49.09 (4th ed. 1973). The court of appeals' reliance upon *Lorillard* was misplaced, for there this Court held only that Congress should be presumed to be aware of *post*-enactment *judicial* or *administrative* interpretation of an incorporated law, at least where there is evidence that Congress gave attention to or was likely aware of such interpretations. 434 U.S. at 580-81. The court of appeals' novel principle is particularly unsound where, as here, Congress did not rely upon incorporation of the termination provision of section 16(b) of the FLSA by reference, but instead enacted a separate, somewhat different provision as part of the ADEA itself, and the limited judicial interpretations of section 16(b) between its amendment in 1961 and enactment of the ADEA in 1967 were contrary to the legislative history in question. *E.g.*, *Wirtz v. Robert E. Bob Adair, Inc.*, 224 F. Supp. 750, 755 (W.D. Ark. 1963). *Compare, e.g.*, *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 403 n.11 (1982) (Powell, J., dissenting). Indeed, the lower court's novel approach to statutory construction, which would affect all federal laws, is itself sufficiently significant to warrant this Court's review.

[10] Originally, the required notification was a "notice of intent to sue." § 7(d), 81 Stat. 602 (1967). In 1978 the requirement was changed to a "charge." 29 U.S.C. § 626(d). The waiting period for

seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(d).[11] These requirements of agency charges and conciliation have no counterpart in the FLSA.[12]

The committee reports on section 7(c), after discussing the importance of the agency's conciliation obligations under the ADEA, state that section 7(c) would terminate the rights of individuals to bring actions when the agency commences an action covering the same grievance, in order for the agency "to discharge [its] responsibilities to achieve to the optimum the purposes of the act." H.R. Rep. No. 805, 90th Cong., 1st Sess. 5-6, *reprinted in* 1967 U.S. Code Cong. & Ad. News 2213, 2218; S. Rep. No. 723, 90th Cong., 1st Sess. 5-6 (1967); 113 Cong. Rec. 34748 (1967).[13] In addition to facilitating the

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commencing a private action is 60 days after filing a charge. *Id.*; *see Vance v. Whirlpool Corp.*, 31 F.E.P. Cases 1115 (4th Cir. 1983). In addition, as to violations occurring in states having certain types of laws for agency enforcement of prohibitions of age discrimination, a plaintiff must also file a charge with the state agency at least 60 days before suing. 29 U.S.C. §§ 626(d), 633(b); *see Oscar Mayer & Co. v. Evans*, *supra*, 441 U.S. at 764-65. Where a state charge is required, the federal charge must be filed within 300 days after the alleged violation occurred; otherwise, it must be filed within 180 days. 29 U.S.C. § 626(d).

[11] The legislative history of the ADEA indicates, moreover, that the required efforts at conciliation must be pursued "exhaustively." H.R. Rep. No. 805, 90th Cong., 1st Sess. 5, *reprinted in* 1967 U.S. Code Cong. & Ad. News 2213, 2218.

[12] Under Title VII as it stood in 1967, EEOC, which could not then sue, was required to conciliate only if it found reasonable cause to believe that the charge was true. 42 U.S.C. § 2000e-5(b).

[13] By contrast, the legislative history in no way suggests that section 7(c)(1) should be construed to facilitate or encourage private actions. In discussing Congress' desire to achieve expeditious enforcement of ADEA claims, the court of appeals stated (Pet. App. 6a n.2) that the ADEA framers "sought to avoid delay '[b]y utilizing the courts rather than a bureaucracy' as the pre-

work of the agency, termination of private actions is obviously intended to " 'relieve the courts and employers of the burden of litigating a multiplicity of suits based on the same alleged violations of the act by an employer.' " *Dunlop v. Pan Am. World Airways, Inc.*, 672 F.2d 1044, 1053 (2d Cir. 1982).

Among the reasons for giving priority to agency enforcement are that the agency has expertise and unique authority, including extensive pre-litigation investigative powers. *See* 29 U.S.C. §§ 209, 211, 626(a); 15 U.S.C. §§ 49-50. EEOC is also typically in a better position than employees or their attorneys to assess the merits of a case and the desirability of pursuing litigation or accepting a settlement achieved through conciliation. EEOC can analyze the evidence, the legal uncertainties, and the inevitable risks of litigation in a far more objective manner than a private plaintiff's attorney who may have a large financial stake in continued litigation, or a former employee who may be suing, at least in part, for highly subjective reasons.[14]

Thus, while similar in many respects to the FLSA and Title VII, the ADEA possesses unique characteristics, one of the most significant of which, particularly reflected in section 7(c)(1), is its pronounced emphasis on governmental agency enforcement, whether through conciliation or litigation, over private litigation.

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ferred forum for the resolution of age discrimination complaints. 113 Cong. Rec. 7076 (1967) (remarks and testimony of Senator Javits)." However, these remarks addressed not the ADEA as enacted, but a possible amendment to an early bill providing solely for agency enforcement through administrative proceedings.

[14] This Court has noted that EEOC is in a better position than private plaintiffs are to advance the public interest in "making the hard choices" required in proceeding in a "unified" manner "to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged." *General Tel. Co. v. EEOC, supra*, 446 U.S. at 331.

B. Other Courts Of Appeals Have Uniformly Recognized The Priority Of Federal Agency Enforcement Of The ADEA Over Private Litigation.

Prior to and since the decision below the courts of appeals have uniformly construed section 7(c)(1) and other provisions of the ADEA as establishing a strong priority of federal agency enforcement by conciliation and litigation over private litigation.

Thus, in *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 841 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978), the Third Circuit stated that "[t]he thrust of the ADEA's enforcement provisions is that private lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor."

Then, in *Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978), citing section 7(c), the Fifth Circuit observed that under the ADEA "administrative remedies and suits brought by the Secretary of Labor are patently encouraged and preferred to private actions." *Id.* at 1038. The court added in *Dean* that Congress intended to avoid the presence of incentives for some employees to sue rather than to conciliate, which it described as "volatile" ingredients which could "severely cripple the mediation process." *Id.* at 1039 & n.8. In *Castle v. Sangamo Weston, Inc.*, 31 F.E.P. Cases 324 (M.D. Fla. 1983), the court recently followed *Dean* (and explicitly rejected the court of appeals' decision in this case) to hold that, "upon filing an action by the EEOC, section 626(c)(1) precludes all private actions arising from the same alleged acts of discrimination, including those private actions which were brought prior to EEOC's complaint." *Id.* at 325.

In *Reich v. Dow Badische Co.*, 575 F.2d 363, 368 (2d Cir.), *cert. denied*, 439 U.S. 1006 (1978), the court of appeals concurred in the interpretation of the ADEA

expressed in *Rogers* and *Dean* concerning the priority of agency enforcement over private litigation:

> The notice requirements reflect the Congressional purpose to achieve remediation primarily by conciliation managed through the Department of Labor or through the appropriate state agency, if there is one, or both. ". . . [P]rivate lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor." *Rogers v. Exxon Research Engineering Co., supra*, 550 F.2d at 841. See *Dean v. American Sec. Ins. Co.*, 5th Cir. 1977, 559 F.2d 1036, 1038. When notice is given to [EEOC], the ADEA imposes on [it] the duty promptly to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion," and [it] may institute suit to eliminate the discrimination [citing cases]. *Even when a timely private suit is commenced after the giving of timely notice of intent to sue, a suit by [EEOC] supersedes the private suit.* 29 U.S.C. 626(c). [Emphasis added.]

The concurring judge made clear that the court's stated understanding of section 7(c)(1) was quite advertent:

> Indeed, even where an individual shall have commenced an action on his own account that action must terminate upon the commencement of an action by [EEOC] to enforce the right of that employee. 29 U.S.C. Section 626(c) so provides, as the [Supreme] Court has noted in *Lorillard v. Pons, supra.* [*Id.* at 373.] [15]

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[15] In *Lorillard v. Pons, supra*, 434 U.S. at 580, this Court noted that "[t]he right of the individual *to sue* on his own terminates * * * if [EEOC] commences an action on his behalf. § 7(c), 29 U.S.C. § 626(c)" (emphasis added). Such equation of the right to "bring" an action with the right to "sue" reflects an understanding that section 7(c)(1) does more than grant and terminate the right to "commence" an action or "file a complaint," for the term "sue" commonly means not only to commence an action but also "to continue legal proceedings for recovery of a right; to proceed with as an action, and follow it up to its proper termination * * * [and] [t]o commence and carry out legal action against another." *Black's*

In *Slatin v. Stanford Research Institute*, 590 F.2d 1292, 1296 (4th Cir. 1979), the Fourth Circuit noted that "the entire thrust of the ADEA's enforcement provision is that private lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor." In its recent decision in *Vance v. Whirlpool Corp.*, 31 F.E.P. Cases 1115 (4th Cir. 1983), the Fourth Circuit, relying on *Reich* and reaching the opposite conclusion from the Second Circuit in the present case, stated:

> [E]ven when a timely private suit is initiated under the ADEA, a suit by the Secretary supersedes the private suit. 29 U.S.C. § 626(c). The fact that under § 626(d) the individual's right to bring a cause of action is subordinate to the Secretary's power to enforce compliance is established by the legislative history. [*Id.* at 1118-19.] [16]

Law Dictionary 1284 (5th ed. 1979). Here, the court below read "bring" in the termination proviso to mean "commence" (a term used only a few words later in the same sentence), while the use of "bring" obviously has a broader meaning earlier in the same sentence where it is used to confer the right to sue. This approach to statutory construction is contrary not only to *Lorillard* but to *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980), where the Court rejected such "bifurcated construction" of a single word in Title VII. *Accord, Bankamerica Corp. v. United States*, 51 U.S.L.W. 4685, 4687 (U.S. June 8, 1983).

[16] The Seventh Circuit appears to agree that agency enforcement of the ADEA has primacy over private litigation. In *Jones v. City of Janesville*, 488 F. Supp. 795 (W.D. Wis. 1980), the district court squarely held that under section 7(c)(1) commencement of an action by EEOC to enforce an employee's rights under the ADEA required dismissal of an action previously filed by the employee. Describing the term "bring" in section 7(c)(1) as ambiguous, the court held that it included the right to "maintain" an action. *Id.* at 797. In a decision in the EEOC action against the employer in *Jones*, the Seventh Circuit, citing section 7(c)(1), noted the lower court's decision in *Jones* without any suggestion that it was in error. *EEOC v. City of Janesville*, 630 F.2d 1254, 1256 & n.1 (7th Cir. 1980).

In refusing to dismiss the private actions the court below ruled that private actions and EEOC actions have co-equal status. That interpretation of the ADEA conflicts with the uniform line of decisions by other courts of appeals construing the ADEA,[17] which the court below failed even to discuss.[18]

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[17] Every district court outside the Second Circuit has reflected the same interpretation of the ADEA. For example, in *Marshall v. American Motors Corp.*, 475 F. Supp. 875, 882 (E.D. Mich. 1979), citing *Reich*, the court observed that "it is clear that [EEOC] is not in the same position as other litigants under the ADEA. Suits brought by [EEOC] supersede those of private litigants." Explaining the reasons for such precedence of an action by the agency, the court added, in terms particularly pertinent here, that many EEOC actions "will involve employees who reside in many states. In such a case, the purposes of the act would best be served by maintaining the integrity of the class * * *." *Id.* at 883. *See also, e.g., Bishop v. Jelleff Assocs.*, 398 F. Supp. 579, 592 (D.D.C. 1974) (EEOC "is empowered to initiate proceedings to supersede pending litigation instituted under the Act"); *Lundgren v. Continental Indus., Inc.*, 14 F.E.P. Cases 58, 61 (N.D. Okla. 1976) (termination provision applies "if after an individual institutes action [EEOC] thereafter institutes action * * *"); *Pieckelun v. Kimberly Clark Corp.*, 493 F. Supp. 93, 97 (E.D. Pa. 1980) (once EEOC proceeds with legal action against an employer, "the employee's private rights are expunged and he cannot pursue the matter further. If a private litigant commences an action, any action taken by [EEOC] supersedes. 29 U.S.C. § 626(c)").

[18] The fundamental importance of the priority of agency enforcement over private litigation is underscored by the fact that, as the foregoing decisions reflect, the courts have relied upon that priority not only in construing section 7(c)(1) but also in deciding such diverse questions under the ADEA as the unavailability of damages for "pain and suffering" (*Dean, Rogers, Slatin*), and the necessity for timely charges and an opportunity for agency conciliation (*Reich, Vance*).

II. THE UNCERTAINTY CREATED BY THE DECISION BELOW CONCERNING AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW WILL HINDER EEOC'S CONCILIATION EFFORTS AND WILL BURDEN THE COURTS AND EMPLOYERS WITH DUPLICATIVE LITIGATION.

The uncertainty over EEOC's authority created by the decision below exacerbates the problems the growing volume of ADEA charges and cases presents to the courts, EEOC, and employers, in that by casting doubt on EEOC's power to terminate pending private actions the decision below will hinder EEOC's ability to conciliate or litigate effectively.

Thus, under the court of appeals' interpretation of section 7(c)(1), when EEOC commences an action to enforce the ADEA rights of an employee or a group of employees, if any of those employees has already commenced his own ADEA action there will be at least two sets of litigants and attorneys seeking to enforce the same rights: each such private plaintiff and his attorneys, and EEOC and its attorneys. As this Court has noted, the public interest guiding an enforcement agency and the private interests motivating individual employees as parties "may not always dictate precisely the same approach for the conduct of the litigation." *Trbovich v. United Mine Workers*, 404 U.S. 528, 539 (1972). Here, for example, the attorneys for the private plaintiffs and the attorneys for EEOC may have different positions or approaches concerning such diverse matters as theories of liability. Yet, even if the cases could be consolidated, evidently neither the agency nor the private plaintiffs would be able to speak for or bind the other, whether the subject be theory of liability, approach to discovery, trial tactics, damages sought, acceptability of a settlement, or some other aspect of the often complex litigation arising under

the ADEA.[19] This fragmentation of authority is counterproductive, for as the Fifth Circuit noted in an observation as applicable to litigation as to settlement, "logic dictates that one set of negotiators, with authority to release defendants from *all* claims, would be in a better bargaining position than negotiators with authority to compromise only part of the action." *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 208 (5th Cir. 1981) (emphasis in original).

Under the decision below, employees who win the race to the courthouse by even the smallest margin will be free to continue their actions once EEOC sues to enforce their rights. Such an inducement to sue prematurely will not only burden the courts but also will substantially interfere with the agency's ability to litigate and negotiate on a comprehensive basis in a manner best calculated to serve the public interest and to accommodate potentially competing interests of present, former, or future employees. Because of the distorting pressures created when private attorneys for some of the individuals have a stake in the outcome, or when a limited number of employees have an unrealistic view of what they should recover, the risk of precipitous suits is quite real. *See, e.g., Vance v. Whirlpool Corp., supra.*

In addition, if EEOC must sue before private plaintiffs sue in order to assure that it will be in a position to control effectively the cases it brings, there would be a disincentive for EEOC to pursue in a meaningful way the

[19] The litigation and enforcement problems confronting EEOC and employers are particularly pronounced in large-scale matters involving many employees in different states: precisely the type of controversy Congress believed could be best resolved by the federal agency. *Cf.* S. Rep. No. 723, 90th Cong., 1st Sess. 16 (1967); *Oscar Mayer & Co. v. Evans, supra*, 441 U.S. at 757-58. Here the *Burns* plaintiffs alone reside in more than ten states. The complexity and potential for confusion are enhanced by the fact that the ADEA grants to parties in private actions a right to a jury trial (29 U.S.C. § 626(c)(2)), which the plaintiffs have demanded.

"exhaustive" conciliation efforts that the ADEA requires as a precondition to suit (*see* p. 11 & n.11, *supra*).[20]

In sum, the uncertainty about the priority of agency enforcement created by the conflict between the decisions of the court below and other courts of appeals will deter parties from engaging in conciliation, will result in added ADEA litigation, and will hamper EEOC in its efforts to enforce the ADEA through conciliation or litigation.[21] This Court should resolve the conflict.

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[20] A further problem caused by the court of appeals' interpretation of section 7(c)(1) stems from the doctrines of res judicata and collateral estoppel, particularly in situations where a joint trial is not feasible or is otherwise inappropriate (*cf.* pp. 5-6 n.3, p. 18 n.19, *supra*). If a private action to enforce an employee's rights is litigated first and the employer prevails, then in an EEOC action seeking to enforce the rights of that and other employees the judgment may be broadly invoked as a basis for a claim of bar or preclusion. *See, e.g., Montana v. United States*, 440 U.S. 147 (1979); *Nash County Bd. of Educ. v. Biltmore, Co.*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981). Thus, EEOC's ability to enforce the ADEA may be hampered by the actions of the private plaintiffs. Conversely, if EEOC's suit were resolved first, it is possible that principles of res judicata would foreclose further litigation by private plaintiffs in their suits, in which event it is difficult to see any rationale for permitting the private actions to survive commencement of EEOC's action. *See, e.g., In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775, 781 (3d Cir. 1975). On the other hand, if there is no bar or preclusion of the private plaintiffs in such circumstances, the result would be needlessly duplicative litigation, which section 7(c)(1) was intended to prevent (*see* p. 12, *supra*).

[21] In the court below the Equal Employment Advisory Council ("EEAC"), an association composed of a broad segment of the employer community, filed an amicus brief in support of petitioner, noting that the rejection of petitioner's position had "serious ramifications beyond those for the parties involved," and that the decision is of "vital concern" to such employers, in part because of the resulting burden of "litigating a multiplicity of suits." Brief Amicus Curiae Of EEAC In Support Of Defendant-Appellant, p. 3. Reflecting the same concern with particular reference to employment discrimination cases, this Court recently rejected an inter-

CONCLUSION

A writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

GERALD P. NORTON
Counsel of Record
WALTER B. CONNOLLY, JR.
TIMOTHY L. MOOREHEAD
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8103

WERNER WEINSTOCK
JOHN P. MANGAN
1285 Avenue of the Americas
New York, New York 10019

FRED A. FREUND
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
Attorneys for Petitioner

June 1983

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pretation of Rule 23, Fed. R. Civ. P., that would have provided employees an "incentive" to file a duplicative private action resulting in "a needless multiplicity of actions * * *." *Crown, Cork & Seal Co. v. Parker*, 51 U.S.L.W. 4746, 4748 (U.S. June 13, 1983).

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 208, Docket 82-7372

KAY BURNS, *et al.*,
Plaintiffs-Appellees,
v.

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
Defendant-Appellant.

EUGENE J. GOSS,
Plaintiff-Appellee,
v.

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
Defendant-Appellant.

Argued Sept. 16, 1982

Decided Dec. 9, 1982

Gerald P. Norton, Washington, D.C. (Walter B. Connolly, Jr. and Pepper, Hamilton & Scheetz, Washington, D.C., Fred A. Freund and Kaye, Scholer, Fierman, Hays & Handler, New York City, Werner Weinstock, John P. Mangan, New York City, on the brief), for defendant-appellant.

Richard Ben-Veniste, Washington, D.C. (Ben-Veniste & Shernoff, Washington, D.C., Leonard N. Flamm and Hockert & Flamm, New York City, Martin Jacobson & Braunstein, Jacobson, Freeman & Viscomi, New York City, on the brief), for plaintiffs-appellees Burns, et al.

Ben H. Becker and Schwartz, Tobia, Stanziale & Gordon, East Orange, N.J., submitted a brief for plaintiff-appellee Goss.

Justine S. Lisser, Washington, D.C. (Michael Martinez, Deputy Gen. Counsel, Philip Sklover, Associate Gen. Counsel, Vincent Blackwood, Asst. Gen. Counsel, Washington, D.C., on the brief), for the E.E.O.C. as amicus curiae.

Robert E. Williams, Douglas S. McDowell, Barbara L. Neilson and McGuiness & Williams, Washington, D.C., submitted a brief for the Equal Employment Advisory Council as amicus curiae.

Before MANSFIELD, VAN GRAAFEILAND, and NEWMAN, Circuit Judges.

NEWMAN, Circuit Judge:

Equitable Life Assurance Society of the United States (Equitable) appeals from two orders of the District Court for the Southern District of New York (Morris E. Lasker, Judge) denying Equitable's motions to dismiss private suits filed under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1976). 530 F.Supp. 768 (S.D.N.Y. 1982). Equitable contended that the private suits were preempted by a later action brought by the Equal Employment Opportunity Commission (EEOC). We agree with Judge Lasker that the private suits have not been preempted and affirm his rulings.

In 1978 and 1979, Equitable terminated over 500 employees, of whom approximately 360 were over 40 years of age. In September 1979, plaintiff-appellee Kay Burns filed a complaint charging Equitable with violations of the ADEA. Over 100 of Equitable's former employees

opted to join the *Burns* action.[1] In January 1980, Eugene Goss, another employee fired in connection with Equitable's staff reduction program, filed an ADEA suit against Equitable in the United States District Court for the District of New Jersey, *Goss v. The Equitable Life Assurance Society of the United States* (No. 80-251), which was transferred to the Southern District of New York (No. 81 Civ. 4766).

Nearly two years after Burns and Goss began their actions, the EEOC filed an action against Equitable, alleging the same ADEA violations. The EEOC originally sought relief on behalf of a group of 434 former Equitable employees, some of whom were already participating in the *Burns* action. Two days after filing its complaint, however, the EEOC stipulated out of its lawsuit all of the *Burns* plaintiffs that it had originally named. Equitable subsequently moved to dismiss the *Burns* and *Goss* actions, relying on section 7(c)(1) of the ADEA, 29 U.S.C. § 626(c)(1), which provides:

> Any person aggrieved may bring a civil action . . . for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person *to bring* such action shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under this chapter [second emphasis added].

Equitable argued that this section of the ADEA required dismissal of pending private actions whenever the EEOC filed its own complaint. Opposing the motion, Burns interpreted the statute to permit pending actions to continue, and to bar only the initiation of new lawsuits after filing of a complaint by the EEOC. The narrow issue posed was whether the statutory phrase "to bring" means

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[1] The "opt-in" procedure is provided by section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which is made applicable to ADEA suits by section 7(b) of the ADEA, 29 U.S.C. § 626(b).

"to commence or maintain," or only "to commence." The District Court, adopting the latter construction, denied Equitable's motion to dismiss the *Burns* suit, 530 F.Supp. 768, and certified that ruling for appeal pursuant to 28 U.S.C. § 1292(b). The District Court subsequently denied Equitable's motion to dismiss the *Goss* suit and also certified that ruling. Our review of the text and legislative history of the ADEA persuades us that the District Court's rulings were correct.

The ADEA expressly incorporates the procedures originally fashioned by the 87th Congress to govern enforcement of the Fair Labor Standards Act (FLSA). Section 7(b) of the ADEA, 29 U.S.C. § 626(b), specifies that the Act "shall be enforced in accordance with the powers, remedies, and procedures" established by the FLSA, specifically including those set forth in section 16(b) of the FLSA, 29 U.S.C. § 216(b). *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 5, *reprinted in* 1967 U.S. Code Cong. & Ad. News 2213, 2218; *Lorillard v. Pons*, 434 U.S. 575, 580-83, 98 S.Ct. 866, 869-71, 55 L.Ed.2d 40 (1978). In 1961 section 16(b) of the FLSA was amended to provide, in language later used in section 7(c)(1) of the ADEA, that an employee's right to "bring an action shall terminate upon the filing of a complaint by the official charged with enforcing the FLSA, the Secretary of Labor. Pub. L. No. 87-30. The House-Senate Conference Report accompanying the 1961 amendments to the FLSA makes it clear that a pending private suit is not preempted by an action brought by the Secretary of Labor:

> The filing of the Secretary's complaint against an employer would not, however, operate to terminate any employee's right to maintain such a private suit to which he had become a party plaintiff before the Secretary's action.

Conf. Rep. No. 327, 87th Cong., 1st Sess. 20, *reprinted in* 1961 U.S. Code Cong. & Ad. News 1706, 1714. Thus, if section 7(b) of the ADEA is understood to incorporate

not only the procedural provisions of the FLSA, but also Congressional understanding of the broad scope of private enforcement of the FLSA under those provisions, independent of public enforcement, then a pending private suit under the ADEA is not preempted by an EEOC action.

When enacting "a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the [judicial and administrative] interpretation[s] given to the incorporated law," at least those concerning the new statute. *Lorillard v. Pons*, *supra*, 434 U.S. at 581, 98 S.Ct. at 870. The presumption is even stronger that Congress was familiar with the reported expressions of its own legislative intent regarding the provisions it has incorporated. Especially is this so where, as here, the incorporating and incorporated statutes are not distant in time, and the selectivity of the incorporation implies a detailed Congressional knowledge of a prior law that was borrowed.

Further inquiry into the legislative history of the ADEA reinforces the conclusion that section 7(c)(1) was intended to adopt the scheme of the FLSA in allocating enforcement authority between public and private plaintiffs. Particularly telling in this respect is the portion of the House Report discussing section 14, 29 U.S.C. § 633, which allocates enforcement authority between plaintiffs suing under state discrimination laws and plaintiffs suing under the ADEA. According to the Report, section 14 requires that "commencement of an action under this act shall be a stay on any State action *previously* commenced." H.R. Rep. No. 805, 90th Cong., 1st Sess. 6 (1967), *reprinted in* 1967 U.S. Code Cong. & Ad. News, *supra*, at 2219 (emphasis added). This wording indicates that the framers of the ADEA well understood how to make clear their intentions to depart from FLSA procedure by permitting a category of pending lawsuits to be preempted. The absence of such an intention with

respect to private ADEA suits pending prior to the filing of suit by the EEOC indicates that Equitable's reading of the statute is unwarranted.

The District Court noted that a rule permitting EEOC complaints to oust pending as well as later filed actions would have two unfortunate consequences. First, private counsel would be motivated to avoid the cases most urgently requiring remedial action, for such cases would also be most likely to invite preemptive public litigation. Second, private counsel willing to initiate ADEA suits would be motivated to delay as long as possible the filing of complaints to increase their opportunity to learn whether EEOC litigation will preempt their efforts. 530 F.Supp. at 771-72. This latter result would impede the achievement of a central goal of the ADEA's framers, who were concerned that delay would prejudice the claims of older plaintiffs, and who consequently sought to achieve expeditious enforcement.[2] Against these concerns Equitable contends that permitting pending private ADEA suits to continue along side of a suit brought by the EEOC will deter conciliation and cause duplication of ef-

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[2] In particular, the ADEA's framers wanted ADEA enforcement to be more expeditious than enforcement practice under Title VII of the Civil Rights Act of 1964. They sought to avoid delay "[b]y utilizing the courts rather than a bureaucracy" as the preferred forum for the resolution of age discrimination complaints. 113 Cong. Rec. 7076 (1967) (remarks and testimony of Senator Javits). Even under Title VII, however, EEOC action does not dominate private litigation to the extent urged here by Equitable. For example, rather than barring the maintenance of pending litigation, EEOC suits under Title VII have been held to be barred by the fact that private litigants have already acted on their own. *E.g., EEOC v. Missouri Pacific R. Co.*, 493 F.2d 71, 75 (8th Cir. 1974); *EEOC v. Pacific Press Pub. Ass'n*, 535 F.2d 1182, 1186 (9th Cir. 1976). *See* B. Schlei & P. Grossman, *Employment Discrimination Law* 1050-51 (1976). We express no view on these rulings. Moreover, the EEOC is limited to permissive intervention in a pending private action. Civil Rights Act of 1964, section 706(f)(1), as amended, 42 U.S.C. § 2000e-5(f)(1) (1976).

fort. We think the District Courts' authority to control litigation can minimize delay and duplication,[3] but however the competing policy concerns are to be weighed, we conclude that the statute does not say or mean that pending private ADEA suits are preempted by EEOC litigation.

The orders appealed from are affirmed.

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[3] Counsel for plaintiffs in the *Burns* and *Goss* cases have stated that they will not oppose a motion to consolidate the private suits with the EEOC's suit.

UNITED STATES DISTRICT COURT
S. D. NEW YORK

No. 79 Civ. 4726 (MEL)

KAY BURNS, JAMES J. CONNORS, JOSEPH L. FARRAR, JUDAH J. HARRIS, FRANCES B. KLEPSCH and JOCK THORNTON, *individually and on behalf of all other persons similarly situated,*
Plaintiffs,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant.

Jan. 27, 1982

Hockert & Flamm, New York City, for plaintiffs; Leonard N. Flamm, New York City, of counsel.

Werner Weinstock, New York City, for defendant; Pepper, Hamilton & Scheetz, Washington, D.C., of counsel.

LASKER, District Judge.

This case arises out of a large scale staff reduction undertaken by defendant Equitable Life Assurance Society of the United States ("Equitable") in 1978 and 1979, in which over five hundred employees were terminated, approximately 360 of whom were over forty years old. The complaint in this action was filed in September, 1979, by Kay Burns and the other named plaintiffs, charging violations of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. ("ADEA"). Over one hun-

dred of Equitable's former employees have opted to join the action,[1] as allowed by 29 U.S.C. § 216(b).[2]

Nearly two years later, on September 1, 1981, the Equal Employment Opportunity Commission ("EEOC") filed an action, No. 81 Civ. 5447, against Equitable, complaining of ADEA violations.[3] As Exhibit A to its complaint, the EEOC attached a list of 434 present and former Equitable employees for whom it seeks liquidated damages, pursuant to 29 U.S.C. § 216(b).[4] Included in that list were a number of the Burns plaintiffs. On September 3rd, EEOC counsel entered a stipulation removing from its Exhibit A all of the Burns plaintiffs.

Equitable now moves to dismiss the instant action on the grounds that dismissal is required by section 626(c)(1) of the ADEA, which provides that:

> "Any person aggrieved may bring a civil action . . . for such . . . relief as will effectuate the purposes of this act: *Provided*, That the right of such person to bring such action shall terminate upon the com-

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[1] The ADEA procedures differ from the class action provisions of Fed. R. Civ. Pr. 23, in that, under the ADEA, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed with the court in which such action is brought." 29 U.S.C. § 216(b).

[2] The ADEA incorporates by reference Sections 16(c) and 17 of the Fair Labor Standards Act, as amended, 29 U.S.C. § 201 *et seq.*

[3] Actions to enforce the ADEA may be brought either by the aggrieved party or by the EEOC. The enforcement of the ADEA was originally under the authority of the Secretary of Labor, and was transferred to the EEOC in 1979. Consequently, the ADEA, as well as most of the cases discussing it, make reference to the Secretary of Labor, not the EEOC. To avoid confusion, references to the Secretary of Labor will be cited here as [EEOC].

[4] Section 216(b) provides that an employer found to be in violation of the Act shall be liable to the aggrieved employees in the amount of their unpaid minimum wages and in an additional equal amount as liquidated damages.

> mencement of an action by [the EEOC] to enforce the right of such employee under this act."

Equitable interprets section 626(c)(1) as providing that an agency suit cuts off all private rights of action, including those of plaintiffs who have already filed suit. Plaintiffs argue that the section allows an agency suit to cut off only a private plaintiff's right to bring an action *subsequent* to the filing of the EEOC action, not his right to continue to prosecute an action already commenced.[5]

The question presented is a narrow one. There is no dispute that once the agency files an action on behalf of certain plaintiffs, the statute precludes those plaintiffs from filing a private action with respect to the same ADEA violation. The issue here is whether the statute requires the dismissal of a private action which is already pending at the time the agency files its action. Thus, the issue turns on the meaning of the word "bring" in section 626(c)(1)'s provision that "the right of such person to *bring* such action shall terminate upon the commencement of an action by [the EEOC]." Does it mean "bring and maintain," as Equitable contends, or "commence," as plaintiffs contend?

Equitable argues that if Congress had meant "bring" to mean commence, it would have used that term, as demonstrated by the fact that the word "commencement" was used in the very same sentence. In addition, Equitable cites language in the legislative history and in cases construing other sections of the ADEA which indicate that Congress intended that, under the ADEA, "private lawsuits are secondary to administrative remedies and suits brought by the [EEOC]." *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 841 (3d Cir. 1977). See also *Reich v. Dow Badische Co.*, 575 F.2d 363,

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[5] The EEOC has filed an affidavit in opposition to the instant motion to dismiss. (Affidavit of James L. Lee, dated September 8, 1981.)

368 (2d Cir.), *cert. denied*, 439 U.S. 1006, 99 S.Ct. 621, 58 L.Ed.2d 683 (1978); 113 Cong. Rec. 34748. Equitable argues that if 626(c)(1) is interpreted to allow the plaintiffs to be represented by both the EEOC attorneys and private counsel, a situation could arise in which private counsel could frustrate EEOC's attempts to settle the case or to conduct it as the agency sees fit, thus thwarting Congressional intent to make private lawsuits "secondary to administrative remedies and suits brought by the [EEOC]." *Id.* Equitable also contends that its construction of the statute would avoid a multiplicity of litigation.

Plaintiffs naturally respond that the phrase "bring [an] action," is understood in ordinary usage to mean to begin or file an action, and that if Congress had meant EEOC actions to supersede a private action, it could easily have said precisely that. Moreover, plaintiffs argue that the legislative history of the ADEA establishes that it was modeled upon the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), and that, under FLSA's cut-off provision, which is nearly identical to the ADEA cut-off provision in dispute here,[6] pending private actions are not terminated by an agency action. Plaintiffs contend that if Equitable's interpretation were accepted, private attorneys would be highly reluctant to undertake ADEA cases, fearing that they could be dismissed on the eve of victory by the EEOC's filing of a suit. Finally, plaintiffs insist that it would be inequitable to allow the EEOC suit, which omits plaintiffs from its claim for liquidated damages, to supersede plaintiffs' action, in which liquidated damages were demanded.

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[6] The cut-off provision of the FLSA states:

> "The right provided by this subsection to bring an action by or on behalf of an employee . . . shall terminate upon the filing of a complaint by the Secretary . . ."

29 U.S.C. § 216(b).

The arguments by both plaintiffs and Equitable regarding the statutory language cancel each other out, or at best, as is frequently the case, are inconclusive in their effect. The contentions consist substantially of the inevitable proposition that the use of particular words establishes that Congress "knew how to say" one thing or another when it wished to do so, and that it should therefore be concluded that when it did not do so, the failure was deliberate. There is only one weakness with this argument: it is not persuasive.

The legislative history contains no discussion of the point in dispute here. In reference to section 626(c)(1), the House Report simply states that "rights of individuals to bring actions shall terminate when the Secretary commences an action." H.R. Rep. No. 805, 90th Cong., 1st Sess. 2, *reprinted in* [1967] U.S. Code Cong. & Ad. News 2213, 2218. While the absence of any discussion of the provision supports plaintiffs' contention that a customary meaning of "bring" was understood and intended by Congress, both parties have argued that their proposed interpretation is the more customary. Equitable argues that by "bring," one ordinarily means "bring or maintain," while plaintiffs assert that to bring an action means, in common-place language, to file a lawsuit. While the answer is by no means obvious, plaintiffs' interpretation is closer to our understanding of the ordinary meaning of the phrase "to bring an action." In fact, when the precise question at issue here was before then District Judge Pierce, in *Sheppard v. National Broadcasting Co., Inc*, 22 EPD ¶ 30876, 79 Civ. 3877 (S.D.N.Y. March 19, 1980), he denied the defendant's motion to dismiss, relying almost entirely on his interpretation of the statutory language:

> "This section only restricts the right to 'bring an action' thereunder. The statute does not expressly limit the right of a complainant to *continue* an action which was commenced prior to the commencement of a related action by the EEOC."

However, the disposition of this motion need not rest solely on an exegesis of ordinary language usage. While the legislative history does not address the precise question at issue, it does specify that "[t]he investigation and enforcement provisions of the bill essentially follow those of the Fair Labor Standards Act." [1967] U.S. Code Cong. & Ad. News, *supra*, at 2218. The FLSA contains a cut-off provision which is very similar to the ADEA cut-off provision and, fortunately, the FLSA legislative history is more enlightening. The House-Senate Conference Report as to that statute states:

> "The filing of the Secretary's complaint against an employer would not, however, operate to terminate any employee's rights to maintain . . . a private suit to which he had become a party plaintiff before the Secretary's action."

Conf. Rep. No. 327, 87th Cong., 1st Sess. 2, *reprinted in* [1961] U.S. Code Cong. & Ad. News 1620, 1706, 1714.

It is true, as Equitable argues, that if Congress had intended that the ADEA cut-off should have precisely the same meaning as the FLSA cut-off, Congress could have simply incorporated it by reference in the ADEA. However, we conclude that the adoption of nearly identical language is, in the absence of any suggestion to the contrary in the legislative history, and particularly in view of Congress' express intent to use "essentially" the same enforcement provisions in the ADEA as in the FLSA, sufficient to indicate that the two provisions should be interpreted as the same.[7]

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[7] The legislative history of Section 633, the provision which cuts off state age discrimination cases in favor of ADEA cases, also casts light on Congress' intent with regard to Section 626(c)(1). The House Report as to Section 633 states: "Commencement of an action under this act shall be a stay on any State action *previously* commenced." [1967] U.S. Code Cong. & Ad. News, *supra* at 2219 (emphasis added).

This conclusion is supported by an evaluation of the policy arguments advanced by the parties. Plaintiffs' argument that, if Equitable's interpretation of the statute is accepted, the rights of private litigants to enforce the ADEA will be severely diminished, is persuasive. Private attorneys may very well be discouraged from accepting ADEA cases if the rule is that no matter how much effort they have expended on a suit, so long as it has not been reduced to judgment, the EEOC may cause the case to be dismissed by bringing its own suit. This concern is particularly serious where plaintiffs are unlikely to be able to afford counsel other than on a contingent fee arrangement.

Of course, an attorney always faces the possibility that his case may be dismissed. However, Equitable interprets the statute so as to create the unusual circumstance that the *stronger* the case; that is, the more egregious the employer's conduct, the more likely it is to invite EEOC action, which would result in dismissal of the private suit.

Moreover, under Equitable's interpretation, the EEOC could wait until several years of litigation have elapsed before filing its own action, resulting in an enormous waste of the resources of the plaintiff, his attorney, and the Court. At that point, the plaintiff, who may have invested substantial time and resources in discovery and otherwise in preparation of his case, would lose the benefit of this investment.

Equitable's contention that this possibility is too remote to warrant consideration is belied by the procedural history of this very case. The Burns plaintiffs filed their action two years before the EEOC's action was filed. During that period, the parties have participated in discovery, motion practice, and several court conferences, as well as expending time in soliciting the participation of the over one hundred opt-in plaintiffs.

If Equitable's interpretation were accepted, private counsel might be well-advised to wait as long as the statute of limitations permits before filing an ADEA action in order to minimize the likelihood of the EEOC filing an action regarding the same violation. In effect, Equitable is urging an interpretation that would tend to cause claims to be filed when they are not fresh, with all of the problems of faded recollection and lost documentation inherent in stale assertions.

Finally, since the Act is clearly intended to protect the plaintiff-employee's rights, it is unlikely to have been Congress' purpose to authorize the EEOC to terminate a private litigant's pending action without at least demanding the same relief for that litigant that his chosen counsel had demanded.

Equitable's arguments to the contrary are not compelling. First, while the cases discussed by Equitable, cited above, do indicate that, in certain circumstances, private actions are secondary to EEOC actions, there is no indication in either the legislative history or the case law pertinent to the ADEA that the subordination of private actions to agency actions was intended to be so great as to undermine the viability of an existing private action. To the contrary, the legislative history of the Act indicates that Congress intended the private right of action to be a significant element in the enforcement of the ADEA. See, for example, the remarks of Representative Halpern: "Most importantly, [the ADEA] gives the aggrieved persons, *along with*, and through, the [EEOC], just and adequate channels to enforce the bill." 113 Cong. Rec. 34749 (emphasis added). See also the House Report on the ADEA, [1967] U.S. Code Cong. & Ad. News, *supra*, at 2218, stating that "the [ADEA] authorizes the employee, as well as the [EEOC] to seek remedies through court actions.", which suggests the co-equal status of employee and EEOC suits.

As for Equitable's concerns in regard to multiplicity of litigation, it does not appear that our disposition adds in any but the most marginal way to its volume. The statute allows each aggrieved person to retain his own counsel and sue individually. Moreover, in those cases in which the EEOC chooses to file an action, there is nothing in the statute precluding the EEOC from filing on behalf of only those persons who have not filed private actions. Thus, even under Equitable's interpretation, there is no mechanism in the statute to save a large company such as Equitable from defending simultaneously against a large number of individual actions, as well as an EEOC action. The value of the slight effect which adoption of Equitable's interpretation would make on the multiplicity of ADEA litigation is outweighed by the policies, discussed above, which militate against such an interpretation.

For the reasons stated above, Equitable's motion to dismiss is denied.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 82-8034

KAY BURNS, *et al.*

v.

EQUITABLE LIFE ASSURANCE SOCIETY

EUGENE J. GOSS

v.

EQUITABLE LIFE ASSURANCE SOCIETY

NOTICE OF MOTION

for Permission to Appeal
Pursuant to 28 U.S.C. § 1292(b)

ORDER

IT IS HEREBY ORDERED that the motion for permission to appeal pursuant to 28 U.S.C. § 1292(b) be and is hereby granted.

[Filed May 12, 1982]

/s/ Wilfred Feinberg
WILFRED FEINBERG
Chief Judge

/s/ Jon O. Newman
JON O. NEWMAN

/s/ Ralph K. Winter
RALPH K. WINTER
Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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81 Civ. 4766 (MEL)

EUGENE J. GOSS,

Plaintiff,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant.

[Filed Apr. 2, 1982]

ORDER

IT IS HEREBY ORDERED that defendant's motion *in limine* seeking dismissal of this action is DENIED for the reasons stated in this Court's Decision and Order in *Burns et al. v. The Equitable Life Assurance Society of the United States*, No. 79 Civ. 4726 (MEL), entered January 28, 1982, and amended by order entered March 29, 1982.

Pursuant to this Court's Endorsement dated March 22, 1982, granting defendant's motion for certification, IT IS FURTHER ORDERED that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from this Order may materially advance the ultimate termination of this litigation and related litigation.

Dated: New York, New York
April 1, 1982

/s/ Morris E. Lasker
MORRIS E. LASKER
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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79 Civ. 4726 (MEL)

KAY BURNS *et al.*,

Plaintiffs,

—against—

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant.

[Filed Mar. 29, 1982]

PROPOSED COUNTER-ORDER

Defendant, The Equitable Life Assurance Society of the United States, having moved by letter dated February 1, 1982 for certification, pursuant to 28 U.S.C. sec. 1292, of the January 27, 1982 decision and order of this Court ("the Decision and Order") denying Defendant's motion *in limine* seeking dismissal of this action, and the Court having rendered its Endorsement dated March 22, 1982 with respect to Defendant's motion,

IT IS HEREBY ORDERED that the Decision and Order be amended to include the following:

"Defendant's motion for certification of this Decision and Order pursuant to 28 U.S.C. sec. 1292(b) is hereby granted. This Decision and Order involves a controlling question of law as to which there is substantial ground

for difference of opinion and an immediate appeal from this Decision and Order may materially advance the ultimate termination of this litigation and related litigation."

/s/ Morris E. Lasker
MORRIS E. LASKER
United States District Judge

Dated: New York, New York
March 29, 1982.

ENDORSEMENT

KAY BURNS, et al., Plaintiffs v. EQUITABLE LIFE ASSURANCE SOCIETY, Defendant. 79 Civ. 4726 (MEL)

EUGENE GOSS, Plaintiff v. EQUITABLE LIFE ASSURANCE SOCIETY, Defendant. 81 Civ. 4766 (MEL)

LASKER, D.J.

Defendant moved by letter of February 1, 1982 for certification of the January 27, 1982 decision of this Court, pursuant to 28 U.S.C. § 1292(b). Defendant's motion is granted. The January 27th decision held that the private plaintiffs could continue to pursue their claims. If on appeal *after* trial that determination is found to have been in error, it may be too late for the private plaintiffs to attempt to join the EEOC action. By contrast, if the private plaintiffs were to suffer an adverse ruling *prior* to trial, the EEOC would have an adequate opportunity to move to amend its complaint to add the private plaintiffs to the list of those for whom it is demanding liquidated damages.

Moreover, one of defendant's primary arguments in support of its motion has been that it should not be compelled to litigate against two sets of lawyers, unless the law is definitively determined to that effect. If, on appeal, defendant's view should prove to have been correct, it will already have suffered the burden from which it claims to be exempt, and there appears to be no way in which it can be compensated for having done so.

In opposition to defendant's motion for certification, plaintiffs argue only that certification would cause delay. However, defendant's letter of February 19, 1982 states that certification will not be the occasion for any delay on its part; that discovery will proceed during the appeal period.

Accordingly, defendant's motion for certification is granted on the question whether Section 626(c)(1) of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., requires the dismissal of a pending private action when the EEOC files a later action on behalf of the same plaintiffs, although the later action does not demand all of the same relief as the earlier. Discovery and trial preparation are to proceed.

Submit order on notice.

/s/ Morris E. Lasker
MORRIS E. LASKER
United States District Judge

Dated: New York, New York
March 22, 1982

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the ninth day of December, one thousand nine hundred and eighty-two

Present:

HON. WALTER R. MANSFIELD

HON. ELLSWORTH A. VAN GRAAFEILAND

HON. JON O. NEWMAN

Circuit Judges,

#82-7372

KAY BURNS, *et al.*,
Plaintiffs-Appellees,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Defendants-Appellant.

EUGENE J. GOSS,
Plaintiff-Appellee,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Defendant-Appellant.

[Filed Dec. 9, 1982]

Appeal from the United States District Court
for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the orders of said District Court be and it they hereby are affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

/s/ Edward J. Guardaro
by EDWARD J. GUARDARO
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-third day of March, one thousand nine hundred and eighty-three.

No. 82-7372

KAY BURNS, *et al.*,
Plaintiffs-Appellees,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Defendant-Appellant.

[Filed Mar. 23, 1983]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, The Equitable Life Assurance Society of the United States,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in

regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A DANIEL FUSARO
Clerk
by

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the First day of February, one thousand nine hundred and eighty-three.

No. 82-7372

KAY BURNS *et al.*,
Plaintiffs-Appellees,
v.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Defendant-Appellant.

[Filed Feb. 1, 1983]

The order filed January 25, 1983, denying rehearing and rehearing in banc, having been entered prematurely, it is

ORDERED that the said order be, and it hereby is, VACATED.

A. DANIEL FUSARO
Clerk

by /s/ Francis X. Gindhart
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of January, one thousand nine hundred and eighty-three.

No. 82-7372

KAY BURNS, *et al.*,
Plaintiffs-Appellees,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Defendant-Appellant.

[Filed Jan. 25, 1983]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, The Equitable Life Assurance Society of the United States,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the

panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO
Clerk

by /s/ Francis X. Gindhart
FRANCIS X. GINDHART
Chief Deputy Clerk